It is this Commission's task, and not that of the State commission, ultimately to determine whether the rates for interconnection, unbundled network elements, and resale comply with these statutory pricing requirements. While the FCC must consult with the states on checklist compliance, it is the FCC, not the state commissions, that must verify that compliance. 31/ It is the FCC's task, therefore, to assure itself that the rates upon which an applicant for interLATA entry relies fully satisfy the substantive requirements of Sections 251 (just, reasonable, and nondiscriminatory rates) and 252 (cost-based or avoided-cost pricing) of the Act.

Those standards have not been met here, not by any stretch of the imagination. First, the OCC has not yet adopted permanent rates for any unbundled elements. Most of SBC's agreements contain rates that were negotiated. These rates may bear little resemblance to the cost of providing a particular element. 32/ The rates in the AT&T/SBC agreement, which were arbitrated by the

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31/ "Before making any determination under this subsection, the Commission shall *consult* with the State commission of any State that is the subject of the application *in order to verify* the compliance of the Bell operating company with the requirements of subsection (c)." 47 U.S.C. § 271(d)(2)(B) (emphasis added). Section 271(d)3) provides that the FCC "shall not approve the . . . application unless it finds that (A) the petitioning Bell operating company has met the requirements of subsection (c)(1) and -- (i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A), has *fully implemented* the competitive checklist in subsection (c)(2)(B)" (emphasis added).

32/ Initial Comments of Brooks Fiber Communications of Oklahoma, Inc. and Brooks Fiber Communications of Tulsa, Inc. (filed March 11, 1997) in Application of Ernest G. Johnson, Director of the Public Utility Division, to Explore the Requirements of Section 271 of the Telecommunications Act of 1996, Cause No. PUD 970000064, ("Brooks OCC Comments") ("Brooks did not have access to [SBC]

OCC, were expressly labeled as interim. 33/ It is irrelevant what interim rates might be in place for the next few months. They are interim, for one thing, and for another, they have not been found to comply with the Act. 34/

Furthermore, SBC has not even established prices, interim or otherwise, for many items. For example, as described by AT&T witnesses Falcone and Turner, the SGAT identifies a charge for "feature activation per port type" which was not included in some of SBC's interconnection agreements. The charge for this element is listed as "ICB" (individual case basis), but SBC "has made it clear in current Oklahoma negotiations with AT&T that this charge will apply to any activation of a vertical switching feature." 35/ At the same time, SBC "has taken the position that this charge is outside the scope of the AT&T arbitration and

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cost studies during the course of the negotiation process, and thus had no specific information in its possession to confirm whether the rates contained in its interconnection agreement with [SBC] are set on appropriately calculated cost bases. Nor has the Commission been called on to make any determination on the merits regarding whether the rates contained in [that agreement] are set at cost-based levels.")

33/ Application of AT&T Communications of the Southwest, Inc. for a Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996, Cause No. PUD 960000218, Report and Recommendations of the Arbitrator (November 13, 1996) ("AT&T Arbitration Order").

34/ "The parties have stipulated that until [SBC] completes appropriate cost studies and submits them to the Commission and AT&T for review . . . the interim rates should be adopted by the Commission, with a true-up once permanent rates are established." AT&T Arbitration Order at 19.

35/ Falcone/Turner Affidavit at ¶ 46 (SBC Application, Appendix -- Volume 4, Tab 21).

will not be determined in the permanent price proceedings to follow that docket." 36/ SBC also has taken the position that customized routing, a critical option for new entrants using unbundled local switching, also must be priced on an ICB basis. 37/ Plainly the Commission cannot make a finding that SBC's rates are in compliance with the Act when SBC will not even reveal to its potential customers what those rates are, or agree that those rates must be determined by regulators to be based on cost.

Another, independent reason why SBC cannot establish that the checklist rates comply with the Act's substantive pricing requirements is that the FCC's rules establishing those standards -- and its jurisdiction to establish them -- has been challenged by the incumbent LECs. 38/ Until there is a final determination as to the substantive pricing requirements of Section 251 and 252, it is not clear what those rates and standards should be. In the meantime, the FCC will need to apply the standards it adopted in its Interconnection Order because those reflect its best judgment, as the expert agency, as to what Sections 251 and 252 require. If the FCC decides to evaluate SBC's proposed rates on the merits,

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36/ Falcone/Turner Affidavit at ¶ 46.

37/ Falcone/Turner Affidavit at ¶ 67. We discuss unbundled local switching and customized routing further below.

38/ Iowa Utilities Board v. FCC, No. 96-3321 et. al. (8th Cir. , petition filed September 6, 1996). Several state commissions challenged the FCC's jurisdiction to adopt pricing rules, though not the pricing rules themselves.

then, those are the standards it must apply. 39/ When the Eighth Circuit issues its decision on the merits, the FCC should take additional comment from the parties on the impact of that decision before it attempts to determine how to evaluate SBC's compliance.

V. SBC IS NOT ACTUALLY PROVIDING ALL CHECKLIST ITEMS, CONTRARY TO THE PLAIN REQUIREMENT OF SECTION 271(C)(2)(B).

Even assuming SBC could satisfy Track A's "competitive presence" test, its applications would fail because SBC is not actually "providing" a number of the checklist items. The plain language of Section 271(c)(2)(B) requires SBC to show that it is actually "providing" each checklist item. In contrast, the standard for a "Track B" application is "generally offer." 47 U.S.C. § 271(c)(2)(3).

The statutory requirement of actually provisioning is of critical importance. Until a requesting carrier actually is taking an unbundled network element, it is impossible for the FCC to determine whether it is being provided in compliance with Sections 251 and 252 of the Act, and whether the item has been "fully implemented" as required by Section 271(d)(3)(a)(i). As the Conference Report for the 1996 Act states:

> The requirement that the BOC "is providing access and interconnection" means that the competitor has implemented the agreement and the competitor is operational. This requirement is important because it

39/ Because the rates proposed by SBC in its application are not ripe for consideration for the reasons stated above, we do not attempt here to evaluate whether they comply with the statutory standards.

> will assist the appropriate State commission in providing its consultation and in the explicit factual determination by the Commission under new section 271(c)(2)(B) that the requesting BOC has fully implemented the interconnection agreement elements set out in the "checklist" under new section 271(c)(2)(B). 40/

Because SBC is not yet providing every checklist item, the FCC cannot yet and need not yet attempt to determine whether the competitive checklist has been met. In particular, among other items, SBC is not actually providing unbundled loops, unbundled local switching, unbundled transport, or nondiscriminatory access to operations support systems. For this reason alone, as WorldCom will discuss in more detail in the following Section, SBC does not meet the checklist.

SBC's attempt to twist the meaning of the applicable statutory provisions must be rejected. SBC argues that a BOC is "providing access" in accordance with the requirements of Section 271 "when the CLEC has a contractual right to obtain the facilities and services." 41/ If this were the case, however, there would be no distinction between "providing" elements under Track A and "offering" elements under Track B. Compare 47 U.S.C. § 271(c)(2)(A)(i)(I) and (II). Congress would not have used two different words if it intended them to have the same meaning.

Furthermore, under SBC's theory, the fact that SBC has not completed the steps necessary for a carrier to actually use a checklist item (*e.g.*, processing

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40/ Conference Report, supra., at 148.

41/ SBC Brief at 16.

collocation applications or developing operations support systems) would not be an obstacle to checklist compliance. 42/ Indeed, the more SBC does to hinder the use of checklist items, the more likely it will be able to rely solely on a paper provision in an agreement or its SGAT rather than actual experience.

SBC's interpretation, moreover, is flatly inconsistent with the Congressional purpose in creating a competitive checklist. As stated by Joel Klein, Assistant Attorney General for Antitrust, Section 271 requires:

> [N]ot only appropriate agreements between the RBOCs and their potential competitors, but also the wholesale support systems necessary to ensure that when a current customer is switched from the RBOC to the new competitor, the switching process occurs quickly and effectively, so that the customer is satisfied and its new phone company is not blamed for messing up the transfer. 43/

Thus, full compliance with operational requirements -- as proven with real world customers -- is essential to satisfy every checklist item. Until SBC can prove that each checklist item is available in a manner that permits competitors to provide timely, reliable service to their customers -- until the gas is flowing through the pipeline and customers truly have a choice -- Section 271(c)(1)(A) is not satisfied.

We note that, based on the transcript of the proceedings before the Oklahoma Commission, it appears that the Oklahoma Commission may have

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42/ Mere paper contractual rights, moreover, may not automatically translate into contract implementation in a manner that promotes competition.

43/ Klein Speech at 9-10.

confused these two standards. The Commission clearly believed the SBC was pursuing a Track A application. 44/ It nevertheless approved SBC's checklist compliance based on a finding that SBC is "providing or generally offering" the checklist items. 45/. The Oklahoma Commission's finding on checklist compliance therefore should not be given any weight.

VI. SBC IS NOT PROVIDING ACCESS TO UNBUNDLED LOOPS.

SBC is not actually providing unbundled loops to any requesting carrier in Oklahoma, and therefore it has not satisfied the second and fourth checklist items -- access to network elements and access to loops unbundled from local switching and other services. 46/

The comments filed by Brooks Fiber and others before the Oklahoma Commission make it clear that SBC is only at the early stages of the process of provisioning collocation and unbundled loops to requesting carriers. 47/ This is not,

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44/ Transcript of Proceedings, Application of Ernest G. Johnson, Director of the Public Utility Division, to Explore the Requirements of Section 271 of the Telecommunications Act of 1996, Cause No. PUD 970000064, April 25, 1997, at 28. We recognize that the Commission will issue formal comments, that it expects to file at the FCC, and that the transcript does not constitute such a formal ruling.

45/ Id. at 29.

46/ 47 U.S.C. § 271(c)(2)(B)(ii), (iv).

47/ Initial Comments of Brooks Fiber Communications of Oklahoma, Inc. and Brooks Fiber Communications of Tulsa, Inc., in Application of Ernest G. Johnson to Explore the Requirements of Section 271 of the Telecommunications Act of 1996, Corporation Commission of Oklahoma, Cause No. PUD 97000064, filed March 11, 1997, at 3-4 (hereafter "Brooks Initial Comments").

moreover, for lack of interest on the part of requesting carriers. Brooks stated in its comments that:

> Brooks will use resale of SWBT's local exchange service to some extent, but only as a secondary method to supplement its primary mode of operation of combining leased SWBT unbundled loops with Brooks transmission and switching facilities. . . . Brooks will also provide service on an on-net basis from those business customers located in close proximity to its fiber optic transmission facilities, *but it is access to and use of SWBT's unbundled loops which will significantly expand Brooks ability to offer local exchange service in Oklahoma City and Tulsa.* 48/

Brooks went on to observe that its current "stopgap" provisioning of local exchange service over T-1 facilities obtained through SBC's access tariffs "is only economically feasible for providing service to certain customers." 49/ Brooks' ability to use unbundled loops is dependent on the implementation of its collocation requests, which, as Brooks documented before the Oklahoma Commission, has been slow and plagued with difficulties. 50/

The point is that implementation of the local competition provisions of the 1996 Act is complex, and is largely in the hands of the incumbent LEC. New

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48/ Brooks Initial Comments at 3 (emphasis added) (footnotes omitted).

49/ Brooks Initial Comments at 3 n.4.

50/ Brooks Initial Comments at 3-4 ("It is Brooks' opinion that these delays have resulted in significant part from an [SBC] collocation process which Brooks has found to be too inflexible to permit the continuous, interactive communications which are necessary for the expeditious processing of technically intricate engineering and construction projects such as these").

entrants are entirely dependent on the incumbent LEC network in order to provide competing local exchange service, as Brooks' experience demonstrates. The record shows that SBC is not providing unbundled loops today to any carrier pursuant to any Section 252 state-approved interconnection agreement. T-1 circuits obtained through access arrangements simply do not count, and as Brooks points out, they do not satisfy the needs of entrants for access to unbundled loop facilities.

Access to unbundled loops will be critical for many entrants, including WorldCom, whose subsidiary, MFS Intelenet, is probably the largest facilities-based competitive local exchange carrier in the country. WorldCom's experience in other states in which it has ordered unbundled loops to provide service to end users uniformly has shown that there are many difficult implementation issues that must be resolved for checklist compliance. In Illinois, which has been a leader in requiring unbundling of network elements, a hearing examiner recently found that Ameritech had not satisfied the checklist for unbundled loops because "provisioning delays that Ameritech competitors have experienced in obtaining access to unbundled elements, including loops, precludes competitors from offering service as attractive to customers as Ameritech Illinois' service." 51/ Similarly, the Georgia Commission recently rejected BellSouth's SGAT upon finding that "BellSouth has been unable to provide certain unbundled loops as requested by new CLECs . . . and

51/ Investigation concerning Illinois Bell Telephone Company's compliance with Section 271(c) of the Telecommunications Act of 1996, Docket No. 96-0404, Hearing Examiner's Proposed Order at 34 (Ill.CC March 6, 1997).

has experienced significant problems in testing and providing other elements that the Statement describes as available." 52/

These state commission findings demonstrate that there is a difference between claiming unbundled network elements are available and providing them in a manner that is useful to competitors. These implementation issues can only be resolved in the context of real-world provisioning. The BOC's incentive to resolve them, moreover, will disappear once interLATA entry is granted. Even assuming SBC and other BOCs act in good faith to speedily implement the unbundling requirements, the job nevertheless requires significant time, effort, and expense on both sides. It is essential that the FCC insist that SBC actually be providing unbundled loops, and that such provisioning is working smoothly, before it can conclude that this checklist item is met.

VII. SBC'S UNBUNDLED LOCAL SWITCHING ELEMENT VIOLATES THE ACT AND THE FCC'S RULES.

The fact that SBC is not actually "providing" unbundled local switching provides a sufficient basis for rejecting SBC's checklist compliance, as discussed above in Section V. Even if the Commission were to ignore the plain meaning of the statute, however, and conclude that mere availability of an item is sufficient to satisfy Section 271(c)(1)(A), the Commission still would be compelled to

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52/ BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Docket No. 7253-U, Order Regarding Statement at 29 (Ga. PSC March 21, 1997)

reject SBC's checklist compliance because the unbundled local switching ("ULS") element SBC proposes to offer has not been shown to meet the requirements of the Act and the FCC's rules.

To comply with the Act and the rules, a customer purchasing the ULS element must be able to: (1) combine local switching with other network elements (often referred to as the network "platform" configuration); (2) use all the features and functionalities of the switch; (3) collect access charges (originating and terminating) on interexchange traffic; (4) send traffic over the same transport facilities used by SBC itself ("shared" or "common" transport); and (5) switch customers as quickly and easily as long distance customers are switched via the PIC-change process (because only a software change is required).

SBC has not shown that its ULS offering complies with these standards or that it has developed the necessary operational capabilities to make unbundled local switching and the network platform configuration usable as a practical matter. Until unbundled local switching is actually being provided and each of these questions is answered both as a theoretical and as a practical matter, it is impossible for the FCC to find that SBC has satisfied this checklist item.

A. SBC Must Allow Requesting Carriers to Purchase a Combination of Network Elements

One of the most important aspects of Section 251(c)(3) of the 1996 Act is the right it gives requesting carriers to combine network elements and to use that "platform" to provide any service. Specifically, Section 251(c)(3) gives "any

requesting telecommunications carrier" the right to obtain unbundled network elements and requires incumbent ILECs to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." The FCC's implementing rules confirm that ILECs must allow requesting carriers to combine elements and prohibits ILECs from separating network elements that the ILEC currently combines except upon the request of the competing carrier. 53/

This unlimited "right to combine" elements in a platform configuration is central to the Act's goal of permitting competitive entry on as flexible a basis as possible. It permits local competition to develop without the need to overbuild already adequate ILEC networks. It permits entrants who want to invest in new facilities to do so in a rational way, based on their own investment and market decisions rather than regulatory requirement. 54/ The right to combine network elements is absolute, and critical.

The record demonstrates that SBC has been quite hostile to the platform approach, which it disparagingly refers to as "sham unbundling." 55/ SBC has included provisions in its SGAT and its interconnection agreements that virtually ensure the platform cannot be implemented without prohibitive expense, if

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53/ 47 C.F.R. § 51.315(a)(b). These rule provisions have not been stayed.

54/ Interconnection Order at 340.

55/ Falcone/Turner Affidavit at ¶ 24.

it can be used at all. As explained by AT&T witnesses Falcone and Turner, SBC's agreements with Brooks and USLD explicitly state that those carriers "shall not cross-connect a [SBC] unbundled loop to a [SBC] provided unbundled switch port." 56/

While the SGAT, as well as some other SBC agreements, does not contain an express prohibition on combining elements, this is a distinction with no significance given the other serious problems with SBC's offering. Specifically, when a carrier proposes to serve a customer using the platform, SBC will treat the conversion as a physical disconnect of its service and a new connection to the CLEC's service. 57/ This proposed treatment is totally unjustified because there is no need for any physical change in the facilities. Rather, this should be entirely an OSS transaction. 58/

Treating platform conversions as physical disconnects is a blatant violation of the nondiscrimination requirement of Section 251(c)(3) and entirely inconsistent with the policy underlying the Commission's rules on combining elements. SBC's proposal would cause the customer to be out of service for some period of time and the new carrier would be forced to pay unnecessary non-recurring charges. 59/ Both of these obviously will have a detrimental impact on a

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56/ Falcone/Turner Affidavit at ¶ 25.

57/ Falcone/Turner Affidavit at ¶ 27, 29; SGAT, Appendix UNE at 12.6.1.

58/ Falcone/Turner Affidavit at ¶ 28.

59/ Falcone/Turner Affidavit at ¶¶ 31, 32.

carrier's ability to offer a service that is competitive with the service offered by SBC. As long as SBC restricts the use of the platform in this way, the Commission cannot find that the ULS element is being provided in accordance with the Act.

B. SBC Must Provide ULS Customers with Access to All the Features and Functions of the Switch.

Under the FCC's rules, a carrier purchasing the ULS element is entitled to use all the features and functionalities of the switch. 60/ SBC has not satisfied this requirement because carriers are not able to purchase DS1 trunk ports or customized routing. Accordingly, no checklist compliance is possible.

DS1 trunk ports are included as part of the local switching element and are necessary to use customized routing from the SBC switch. According to AT&T witnesses Falcone and Turner, SBC has not included prices for DS1 trunk ports in any of its agreements and has not responded to a request made by AT&T in face-to-face negotiations for DS1 trunk port pricing. 61/ Similarly, SBC's SGAT includes prices for a number of different types of ports, but not for DS1 trunk ports. 62/

In part because of its failure to offer DS1 trunk ports, SBC is not providing customized routing as required under the FCC's rules. 63/ Neither the

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60/ Interconnection Order at ¶ 412.

61/ Falcone/Turner at ¶¶ 60-61.

62/ SGAT, Appendix Pricing Schedule at 2.

63/ Interconnection Order at ¶ 418.

SGAT nor any of SBC's agreements include a price for customized routing. 64/ Moreover, a number of implementation problems have surfaced in Texas because SBC "has chosen the least desirable method for providing customized routing." 65/ Given the obvious inability of carriers to purchase and use DS1 trunk ports and customized routing, the Commission cannot conclude that SBC is providing the ULS element in accordance with the requirements of the Act.

C. SBC Must Permit Purchasers of Unbundled Local Switching to Act as the Access Provider.

The 1996 Act requires incumbent local exchange carriers such as SBC to provide network elements "in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element." 66/ Originating and terminating interstate access are among the telecommunications services that can be provided using the unbundled local switching element. The FCC adopted rules implementing Section 251(c)(3) that defined unbundled network elements -- including the unbundled switching element -- as incorporating the ability of a

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64/ Falcone Turner at ¶¶ 66-68.

65/ Falcone/Turner at ¶ 65.

66/ 47 C.F.R. § 51.307(c). This FCC rule, interpreting the similarly worded Section 251(c)(3) of the 1996 Act, 47 U.S.C. § 251(c)(3), has not been stayed by the U.S. Court of Appeals for the Eighth Circuit. See Iowa Utilities Board v. FCC, No. 96-3321, Order Granting Stay Pending Judicial Review, slip op. at 8-9 & n.3 (8th Cir., Oct. 15, 1996).

competitor to provide originating and terminating interexchange access to itself and to be the sole access provider to IXCs serving its own customers. 67/

SBC's application is silent on this issue. Consequently, before it possibly can approve an application under Section 271, the BOC must confirm that it will (1) permit a requesting carrier using the ULS element to collect access charges for interexchange traffic, and (2) provide all the billing information necessary for a carrier to collect such charges. The theoretical right to be the access provider is meaningless without the data necessary to bill IXCs.

D. SBC Must Provide Nondiscriminatory Access to its Interoffice Network.

For unbundled switching to be used effectively, SBC must provide nondiscriminatory access to its interoffice transport network. In the SGAT, SBC proposes to provide "Common Transport," which enables a ULS customer to "transport the local call dialed by the Unbundled Local Switching element to its destination through the use of [SBC's] common transport network." 68/

67/ See 47 C.F.R. §§ 51.307(c); 51.309(b) ("A telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers."). See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration, CC Docket No. 96-98, FCC 96-324, at ¶ 11 (released Sept. 27, 1996) ("First Reconsideration Order"). ("Thus, a carrier that purchases the unbundled local switching element to serve an end user effectively obtains the exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service, for that end user.") These non-pricing provisions of the FCC's interconnection regime have not been stayed. See also 47 U.S.C. § 251(c)(3).

68/ SGAT, Appendix UNE at 8.1.1.

It is not entirely clear whether this definition, however, would afford requesting carriers access to the shared interoffice network used by SBC for transport of its own local traffic. Put differently, it is essential that SBC show that entrants may employ the routing instructions resident in the switch to route traffic over the SBC interoffice network, in the same way that SBC's own traffic is routed, rather than having to employ customized routing and separate trunk ports to send that traffic out of the switch. Any denial of access to shared use of SBC's interoffice network would be contrary to the FCC's rules requiring access to unbundled elements that is "equal-in-quality" to that provided to the incumbent LEC itself, and would violate the FCC's express requirement that incumbent LECs provide both dedicated and shared transport. 69/

Until SBC establishes that this is the case in Oklahoma, the Commission cannot find that the checklist is satisfied. As with other unbundled elements, satisfying the transport checklist item requires the actual provision to requesting carriers of that item. The need to clarify the meaning of "common transport" in SBC's offerings is another example of the need for actual provision of the element.

E. SBC Must Convert Customers Served by the Platform At Parity With Interexchange "PIC" Changes.

As discussed above, SBC proposes to treat customer conversions as a physical disconnect of the customer's service when the competing carrier is using a

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69/ Interconnection Order at paras. 441, 312, 258.

platform of unbundled elements. 70/ As explained by AT&T witnesses Falcone and Turner, this approach is totally unjustified because when a customer is to be served with a combination of unbundled elements "[n]o work would be required within the loop or switch itself. It is, or should be, entirely an OSS transaction." 71/ Because there is no need for any physical change in the facilities, SBC's proposed treatment of the platform blatantly violates the FCC's decision that customer conversions requiring only a software change be accomplished at parity with the PIC change process for long distance carriers. As the FCC stated in the Interconnection Order:

> We agree with CompTel and [WorldCom] that new entrants will be disadvantaged if customer switchover is not rapid or transparent. . . . Therefore, we require incumbent LECs to switch over customers for local service in the same interval as LECs currently switch end users between interexchange carriers. 72/

Until SBC implements the proper treatment for platform conversions, the Commission obviously has no basis upon which to even measure whether such conversions are processed at parity with PIC changes. Accordingly, the Commission must find that SBC is not providing the ULS element as required under the Act.

70/ SGAT, Appendix UNE at 12.6.1.

71/ Falcone/Turner Affidavit at ¶ 28.

72/ Interconnection Order at ¶ 421.

VIII. SBC HAS NOT PROVIDED ACCESS TO OPERATIONAL SUPPORT SYSTEMS ON A NONDISCRIMINATORY BASIS.

In the Interconnection Order, the Commission concluded that an incumbent LEC is required to provide access to OSS functions pursuant to its obligation to offer access to unbundled network elements under Section 251(c)(3). 73/ This conclusion was based on the determination that access to OSS functions is necessary for meaningful competition and that failing to provide such access would impair the ability of requesting carriers to provide competitive service. 74/ Because OSS is a required network element under Section 251(c)(3), it is incorporated in the competitive checklist pursuant to Section 271(c)(2)(B)(ii) and must be "fully implemented" before a Section 271 application can be granted.

In addition to being an independent unbundled element, the provision of nondiscriminatory access to OSS is an essential prerequisite to finding that other unbundled network elements are being provided in accordance with the Act. For example, if a BOC's systems prevent it from being able to provision a loop in a timely, reliable manner, the loop element is not satisfied under the checklist. As the hearing examiner in Illinois found, "this Commission must be confident that the time can be provided to the requesting party on a non-discriminatory basis and at a quality level that is at parity with the quality that it itself receives." 75/

73/ Interconnection Order at ¶ 516-17.

74/ Id. at ¶ 516.

75/ Illinois HEPO at 34.

Full OSS implementation is a critical prerequisite to interLATA authority. 76/ To satisfy the requirements of the Act, SBC must show not only that its OSS have been tested and are available to competitors, it must demonstrate that these systems are in use and capable of processing service orders from competing carriers in a timely, nondiscriminatory manner. Otherwise, new entrants will not be able to make service commitments to potential customers and their ability to compete in the local exchange market will destroyed. SBC must show that its OSS would enable entrants to fill orders on a commercial scale.

When judged under this standard, it is plain that SBC is not yet providing OSS in a manner that satisfies the requirements of Section 251(c)(3). SBC acknowledges that no carrier is yet using its OSS for unbundled elements. 77/ SBC nevertheless asserts that the mere paper availability and internal testing of these systems is sufficient to pass muster under Section 271. 78/ As explained by AT&T witness Dalton, SBC's assertion has no basis in reality:

> With respect to UNE OSSs, industry standards have been defined on a very limited basis and this has limited AT&T's progress with [SBC]. AT&T and [SBC] are only in the very early stages of negotiations for electronic interfaces. It is inconceivable that anyone from either

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76/ See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Order on Reconsideration, CC Docket No. 96-98, FCC 96-476 at ¶ 11 n.32 ("OSS Order").

77/ Lowrance Affidavit at ¶ 14 (SBC Application, Appendix, Volume 1, Tab 14); Ham Affidavit (OSS) at ¶ 45 (SBC Application, Appendix, Volume 1, Tab 7).

78/ Ham Affidavit (OSS) at ¶ 59.

side can assert that the implementation of OSS for UNE is "well on its way." 79/

Because no carrier yet is actually using any unbundled elements, there is no way to know exactly what implementation problems will arise with respect to the SBC systems necessary to support those elements. However, based on carriers' experience with SBC to date, it is a virtual certainty that implementation will not proceed without the need to resolve thorny issues that compromise service. For example, because SBC has yet to develop mutually agreeable electronic interfaces, AT&T has decided to use SBC's proprietary systems. AT&T made this decision "to ensure earliest market entry despite the inherent limitations of [SBC's] proprietary systems and the additional expense and capital requirements of such decision." 80/

The significance of the prematurity of SBC's claims to satisfy the OSS needs of entrants is magnified when compared with the ease with which SBC will be able to switch customers to its interLATA service. Because potential competitors like WorldCom will be competing with SBC in the full service market, the deficiencies in SBC's OSS -- when compared to the simplicity of a PIC change -- would give SBC a substantial competitive advantage if it were allowed to provide interLATA services at the present time, as the FCC itself recognized. 81/ This disparity is further exacerbated by SBC's decision to treat a conversion to a

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79/ Dalton Affidavit at ¶ 66 (SBC Application, Appendix, Volume IV, Tab 21).

80/ Dalton Affidavit at ¶ 79.

81/ Interconnection Order at ¶ 421.

platform of unbundled elements as a physical disconnect of the customer's service, rather than a software change that must be accomplished at parity with PIC changes.

OSS implementation is a complex task, made more difficult because of the lack of national standards for the OSS required for interconnection, unbundled elements, and resale. The Ordering and Billing Forum ("OBF") of the Alliance for Telecommunications Industry Solutions ("ATIS") has been working on this goal, and WorldCom and MFS have both been active participants in that process. Given the complexity and importance of OSS, it is evident that national standards are urgently needed. To ensure that the industry takes the steps necessary to develop these standards, the Commission should establish a date by which it will set OSS standards if none are developed by the industry. This should provide all parties the motivation to develop and implement OSS.

IX. SBC'S ENTRY AT THIS TIME INTO THE INTERLATA MARKET WOULD HARM THE PUBLIC INTEREST.

WorldCom urges the Commission not to reach the public interest test in connection with SBC's application. The public interest analysis only takes place once a BOC has satisfied the competitive presence test of Section 271(c)(1)(A) and the competitive checklist test of Section 271(c)(2)(B). Because those tests have not been satisfied here, the FCC should ignore as premature the extensive argumentation SBC includes in its brief on the public interest test.

Although there is no need in this case to reach the public interest analysis, we nevertheless address in these comments the considerations that would underlie such an analysis if and when it becomes necessary. As a threshold matter, we note that as long as the basic requirements of the Act are under a cloud of judicial review, 82/ the FCC cannot know for sure whether, and to what extent, the ground rules it adopted in the Interconnection Order will govern competition for all time to come. So long as such a cloud persists, the FCC cannot approve an application for interLATA entry unless it can determine, under the worst case scenario that might result from judicial review, that interLATA entry will not harm the public interest. 83/

Congress made it clear that *in addition to* ensuring that there are facilities-based competitors in a state and that the BOC has fully implemented the competitive checklist, the FCC still had to make an independent determination that entry by the BOC would be in the public interest. The Department of Justice's views on the public interest evaluation are entitled to "substantial weight." 84/ It is

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82/ The challenges to the FCCs jurisdiction to establish prices, to the establishment of TELRIC and avoidable cost pricing methodologies, to the "pick-and-choose" rule, and to the right to combine unbundled elements will not be resolved until Supreme Court review of the FCC's Interconnection Order is completed. Certain of those issues could even remain under a cloud after that. These are all critical to the success of local exchange competition, and therefore are relevant to the public interest analysis under Section 271.

83/ For example, if the State has not prescribed a methodology, as is the case in Oklahoma, the FCC must assume that the BOC is permitted to offer unbundled network elements using a historical, fully distributed cost methodology.

84/ 47 U.S.C. § 271(d)(2)(A).

significant that Congress did not establish any particular test for the public interest evaluation, and that it expressly permitted the Department of Justice to apply any standard that it believed appropriate in evaluating a BOC's Section 271 application. 85/ The FCC must give significant weight to the Department's competitive analysis.

WorldCom and MFS, as well as many other parties, provided extensive comments to the Department on December 13, 1996, in response to its request for competitive analysis of the impact of BOC entry. We have attached copies of those comments and incorporate them by reference to these comments. Put simply, in making the public interest determination, the Commission must consider the effect interLATA entry would have on consumer choice and competition in all markets -- local, long distance and full-service.

In determining whether SBC's entry would serve the public interest, the FCC also must consider the fact that two indispensable components of its "competition trilogy" for assuring the vibrant development of local and full-service competition -- Universal Service and Access Charge Reform -- have yet to be implemented. 86/ Although the FCC is likely to rule in both proceedings in the near

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85/ 47 U.S.C. § 271(d)(2)(A).

86/ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, FCC 96J-3 (Joint Board, released Nov. 8, 1996) ("Universal Service Recommended Decision"); Access Charge Reform, CC Docket Nos. 96-262 et al., Notice of Proposed Rulemaking, Third Report & Order, and Notice of Inquiry, FCC 96-488 (released Dec. 24, 1996) ("Access Reform NPRM").

future, until the necessary reforms are fully implemented, SBC will retain an unfair competitive advantage that would preclude meaningful local competition and unfairly interfere with long distance competition. 87/

Specifically, under the current universal service regime, SBC and other incumbent LECs receive forms of universal service support to which other local competitors have no access. These include explicit forms of support such as funding for the Lifeline and Link-Up programs, as well as much more significant implicit forms of support, primarily through inflated access charges. End users in need of universal service support must be able to receive that support whether they choose SBC or an alternative provider for local telephone service.

Compounding this disparity between SBC and its potential competitors in the local market is the fact that SBC's current above-cost access charges cross-subsidize local phone rates. For example, residential end users in Oklahoma pay SBC a monthly charge that includes a subscriber line charge ("SLC") capped at several dollars below the portion of the cost of local exchange service that is allocated to the interstate jurisdiction. IXCs pay the remaining cost through the carrier common line ("CCL") charge. Competing local providers receive no such assured subsidy.

87/ WorldCom filed comments and reply comments in response to the Access Reform NPRM. WorldCom discussed at length the link between local exchange competition and access reform, and the importance of enabling carriers to self-supply access by becoming local exchange carriers via purchase of cost-based unbundled network elements.